RESERVE OIL, INC., ET AL.

IBLA 78-575, 78-619 Decided August 22, 1979
78-625, 78-629
78-642, 79-11
79-14, 79-18
79-29 79-115
79-138

Appeals from decisions of the Nevada and Idaho State Offices, Bureau of Land Management, requiring in part the execution of a wilderness protection stipulation for certain oil and gas leases.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness – Oil and Gas Leases: Stipulations

Where the land embraced in a proposed oil and gas lease, to be issued subsequent to the enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), has been identified as having wilderness characteristics and is being reviewed for possible preservation as wilderness pursuant to sec. 603 of that Act, it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that consent to oil and gas operations will not be given if it is determined that such operations will impair the land's wilderness characteristics.

2. Federal Land Policy and Management Act of 1976: Wilderness – Oil and Gas Leases: Stipulations.

Where the land embraced in a proposed oil and gas lease has been identified as having wilderness characteristics and is being

reviewed for possible preservation as wilderness pursuant to sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that oil and gas operations are subject to regulation where the obvious aim is protecting the wilderness values inherent in the land.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for the appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This case involves appeals from various decisions of the Nevada State Office, Bureau of Land Management (BLM), requiring in part the execution of a wilderness protection stipulation for certain oil and gas leases. 1/

Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), provides for review by the

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Name of Appellant IBLA Docket Application Number

Reserve Oil, Inc. 78-575 N 19611

Reserve Oil, Inc. 78-619 I 13470-13495

I 13497-13513

I 13517-13518

Reserve Oil, Inc. 78-625 N 20494

A. A. McGregor 78-629 N 18045-18092

N 18095-18096

N 18156

N 18160

N 18171-18174

A. A. McGregor 78-642 N 18359-18365

A. A. McGregor 79-11 N 18149-18155

N 18157-18159 N 18161-18164

N 18167-18170

N 18175-18181

Harry K. Veal 79-14 N 18680-18681 A. A. McGregor 79-18 N 18093-18094 Buttes Resources Co. 79-29 N 18623-18624

N 18627-18628

N 18630-18632

Reserve Oil, Inc. 79-115 N 21431

A. A. McGregor 79-138 N 18366

Secretary of the Interior of certain areas of the public lands identified as having wilderness characteristics for possible designation by Congress as wilderness areas pursuant to the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). During the review period the lands shall be managed

in a manner so as not to impair . . . [their] suitability . . . for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of . . . [FLPMA]: Provided, that, in managing the public land the Secretary shall . . . take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (1976).

The wilderness protection stipulation involved in these cases indicates that the subject lands are being "inventoried or evaluated for their wilderness potential" by BLM. Until BLM determines that they lack wilderness characteristics or Congress decides not to designate the lands as wilderness areas, the stipulation provides that the leases will be subject to two particular conditions:

- 1. Any oil or gas activity conducted on the leasehold for which a surface use plan is not required under NTL-6 (for example, geophysical and seismic operations) may be conducted only after the lessee first secures the consent of the BLM. Such consent shall be given if BLM determines that the impact caused by the activity will not impair the area's wilderness characteristics.
- 2. Any oil and gas exploratory or development activity conducted on the leasehold which is included within a surface use plan under NTL-6 is subject to regulation (which may include no occupancy of the surface) or, if necessary, disapproval until the final determination is made by Congress to either designate the area as wilderness or remove the section 603 restrictions.

These stipulations were generated under direction of the Department's Secretariat to provide a means whereby oil and gas leasing activity on public lands can continue while the Department is carrying out the Congressional mandate to study and protect wilderness areas.

In their statement of reasons for appeal, while appellants do not contest the requirement in condition No. 1 that BLM consent to oil and gas operations, they do contend that the standard for review

is improper, viz., that such operations not impair the land's wilderness characteristics. They argue that they fall within the exception to the statutory requirement that the land be managed so as not to impair its suitability for preservation as wilderness, specifically the language, "subject, however, to the continuation of . . . mineral leasing." 43 U.S.C. § 1782(c) (1976). This language, they argue, was intended to protect the continued issuance of new mineral leases and not the continuation of existing leases, which were amply protected by sections 701(a) and 701(h) of FLPMA, nupra.2/ Rather, BLM should apply the standard that oil and gas operations not result in unnecessary or undue degradation of the land. See 43 U.S.C. § 1782(c) first proviso. This would have the effect, they argue, of permitting oil and gas operations whereas an impairment of the wilderness suitability standard would serve to prevent such operations.

Appellants also object to condition No. 2 on the ground that it makes oil and gas operations subject to unadopted regulations. Appellants contend that by "regulation" BLM refers to the interim management guidelines which were intended to provide for management of land, identified as having wildeness characteristics, during the review period. At the time appellants received the stipulation these guidelines had not yet been adopted. Thus, appellants argue, they could not make an intelligent business decision as to whether to accept the leases.

[1] Section 603(c) of FLPMA, <u>supra</u>, provides that land identified as having wilderness characteristics should be managed during a review period so as not to impair its suitability for preservation as wilderness, subject to the "continuation of . . . mineral leasing." By its terms the statute does not provide for the continuation of <u>new</u> mineral leasing. Rather, it provides that leasing, "in the manner and degree in which the same was being conducted on the date of approval of this Act," 43 U.S.C. § 1782(c) (1976), shall be continued. Furthermore, by "mineral leasing" the statute does not encompass a pattern of issuing mineral leases. Rather it refers to the operation of mineral leases. "The mere issuance of a mineral

"Nothing in this Act or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976]."

Section 701(h) of FLPMA, supra, provides:

"All actions by the Secretary concerned under this Act shall be subject to valid existing rights."

These provisions are general in nature, designed to apply to a multitude of cases. The more specific language in 43 U.S.C. § 1782(c) (1976) applies in the particular context of the management of wilderness study areas.

^{2/} Section 701(a) of FLPMA, supra, provides:

lease has no impact on an area's wilderness characteristics – it is operations conducted pursuant to a lease which can impair the suitability of an area for preservation as wilderness." Interpretation of section 603 of Federal Land Policy and Management Act of 1976 – Bureau of Land Management (BLM) Wilderness Study, Solicitor's Opinion, 86 I.D. 89, 114 (1976). Thus, the language clearly applies to leases outstanding on October 21, 1976, the date of approval of FLPMA. See Interpretation of section 603 of Federal Land Policy and Management Act of 1976 – Bureau of Land Management (BLM) Wilderness Study, Solicitor's Opinion, supra.

This is the position adopted in the Draft Interim Management Policy and Guidelines for Wilderness Study Areas, 44 FR 2695 (Jan. 12, 1979), adopted subsequent to the relevant facts in this case. It states that "mineral leasing uses that existed on the date of enactment of FLPMA (October 21, 1976) may continue in WSA's (Wilderness Study Areas) in the same manner and degree as on that date, even if this impairs wilderness stability." 44 FR 2695, 2701-2 (Jan. 12, 1979). "[M]ineral leasing uses that are new ... must meet the test of not impairing wilderness suitability." 44 FR 2695, 2702 (Jan. 12, 1979).

Appellants' reaction that oil and gas operations would necessarily be prevented by an impairment of wilderness suitability standard is inappropriate. The interim management guidelines clearly contemplate that "some oil and gas exploration and development activities as determined on a case-by-case basis may be permitted," 44 FR 2695, 2706 (Jan. 12, 1979), e.g., where the impact of oil and gas operations can be successfully removed through rehabilitation within 5 years of designation of the land as wilderness or where the impact is substantially unnoticeable.

In any case, appellants' leases if issued would be subject to the impairment of wilderness suitability standard. BLM's wilderness protection stipulation embodies the essence of that standard, requiring that BLM withhold its consent to oil and gas operations where such operations would impair the subject land's wilderness characteristics. Accordingly, it was proper for BLM to require appellants to execute such a stipulation.

[2] As regards appellants' objection to condition No. 2 of the wilderness protection stipulation, appellants misconstrue the language of that condition. It does not make oil and gas operations subject to any particular regulation but rather regulation in general with the obvious aim of protecting the wilderness values inherent in the subject lands, as defined by the Wilderness Act, 16 U.S.C. § 1131(c) (1976). At the time the stipulation was imposed, BLM had a mandate from Congress to manage lands identified as having wilderness characteristics so as not to impair their suitability for preservation as wilderness. 43 U.S.C. § 1782(c) (1976).

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This is the thrust of condition No. 2 of the wilderness protection stipulation. It is in this light that appellants must decide whether or not to pursue their lease offers.

While it may lead to some hesitancy on the part of a prospective lessee, a lease stipulation which leaves the details of oil and gas operations to be worked out during the course of the lease term is not improper. It merely recognizes the change inherent in oil and gas operations as well as the need, in such cases as these, to carefully weigh the degree to which such operations may affect the suitability of an area for preservation as wilderness.

Accordingly, it was proper for BLM to require appellants to execute such a stipulation.

We feel obliged to say that if a lessee accepts these special wilderness protection stipulations and later it is determined by BLM in its wilderness inventory that none of the lands in the lease possess wilderness values, the accepted wilderness protection stipulation as to such lease will become a nullity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques Administrative Judge

I concur:

James L. Burski Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

An "oil and gas lease" is the vehicle by which a landowner conveys to the lessee the legal authority to enter the subject land to explore for, produce, recover, and save oil and gas from the property. Definitions to this effect are legion. See, e.g., A Dictionary of Mining, Mineral and Related Terms, 1968 ed., a publication of this Department. It is beyond cavil that the creation of this right was what the Congress intended in enacting the Mineral Leasing Act of 1920 and its several amendments. In so legislating, the Congress invested the Secretary with discretion to lease a particular tract or to refrain from leasing in the public interest. Thus, if those who exercise the delegated authority of the Secretary perceive that it would be advantageous to create the right to enter the land to explore for, develop, and produce petroleum products, an oil and gas lease should issue; but if such activities are perceived to be inimical to the public interest at the present time, they have the statutory authority to refrain from leasing.

But the compound instrument which BLM is proffering these appellants is not an oil and gas lease at all. It does not confer on the would-be lessees the rights that pass under an oil and gas lease. The basic instrument purports to authorize the holders to engage in the normal and ordinary pursuits of an oil and gas lessee and enjoy the usual benefits, but the required stipulations, which would be incorporated as part of the basic instrument, would totally negate all right of enjoyment pending some further, prospective, conditional authorization which would permit the "lessee" to do the very things that the "lease" is supposed to authorize. In short, the lease form and the stipulations to be incorporated therewith are almost wholly incompatible and inconsistent, the stipulations having the dominant effect. The stipulations prohibit the "lessee" from engaging in any oil or gas exploration or development unless and until the "lessee first secures the consent of BLM." But this is wholly incongruous; the "consent of BLM" is supposed to be represented by the issuance of the oil and gas lease, because that is the essential nature of an oil and gas lease. As we found in <u>Duncan Miller</u>, 6 IBLA 218 (1972):

The special stipulations would forbid the lessee from exercising the rights nominally conferred by the lease unless and until he applied for and received from the Forest Supervisor special land use permits specifically authorizing that particular activity. [At 218.] . . . The stipulations are so stringent as to be nugatory of the lease itself, in that the lessee could not exercise the basic rights afforded by the lease until he applied for and was granted a series of special land use permits at the discretion of the Forest Supervisor. [At 220.]

As in Miller, supra, I find that the stipulations are nugatory of the lease, so that whatever interest would be created, it certainly would not constitute what the law recognizes as an oil and gas lease.

Since this concocted instrument is not an oil and gas lease, what is it? It is not an option, because the purchaser is not buying any choice or election. The thing most nearly resembles a "right of first refusal," in that if, during its specified term, the Government decides to authorize entry, exploration, and development, the holder would have the exclusive right to pursue these activities, although it is by no means indicated that such authorization will ever be granted. Essentially, BLM is offering to allow these appellants to purchase a priority in case oil and gas activities are allowed during the 10-year period covered. In order to gain this position of privilege, the holder would be obliged to pay rental at the same rate as he would for an actual oil and gas lease with full right of enjoyment.

Private parties are at liberty to make whatever kind of contractual arrangement they deem to be mutually advantageous, within certain common law limitations. But the Executive Branch of the Government can only create such interests in public land as the Congress has authorized by statute, as plainly provided in the Constitution. While the instrument which is the subject of these appeals purports to be an oil and gas lease issued under the authority of the Mineral Leasing Act, it is only superficially masqueraded as such, and in reality would constitute an interest of an entirely different and vastly inferior status. I know of no statute which authorizes the creation of such an interest. Calling an instrument an oil and gas lease does not make it one. The Mineral Leasing Act authorizes the issuance of oil and gas leases and the discretion to withhold land from leasing. It does not authorize the creation of other kinds of interests such as options, rights of first refusal, or future interests on condition subsequent, or any interest of that sort, in the Federal mineral estate.

This Board has often recognized the right of authorized officers of BLM to impose reasonable stipulations on oil and gas leases for the protection of other resource values, where the stipulations have legitimate protective goals and do not unreasonably interfere with the lessee's rights of enjoyment. Houston Oil and Minerals Corp., 22 IBLA 172 (1975); Earl R. Wilson, 21 IBLA 392 (1975); Richard P. Cullen, 18 IBLA 414 (1975); A. Helander, 15 IBLA 107 (1974); George A. Breene, 13 IBLA 53 (1973). Moreover, we have repeatedly held that no lease should issue with stipulations so restrictive that the use of the land for any purpose associated with the exploration for or production of oil or gas is totally precluded. Dell K. Hatch, 33 IBLA 138 (1977); Cartridge Syndicate, 25 IBLA 57 (1976); Bill J. Maddox, 24 IBLA 147 (1976); Bill J. Maddox, 22 IBLA 97 (1975).

Counsel for BLM argues that this Board should find that these stipulations do not restrict all oil and gas activity because certain activities will be allowed "upon a finding that the proposed activity, with proper safeguards, will not cause impairment of the area." Counsel neglects the possibility that no such finding will be made within the term of the "leases" at issue.

The appeal of <u>Bill J. Maddox, supra</u>, presented a remarkably similar issue. In that case BLM required, as prerequisite to the issuance of certain oil and gas leases, that the applicant execute various stipulations, the first of which provided that "the lessee agrees not to enter the lease area until an inventory of archaeological and/or historical sites is made by the surface management agency or its designated representative, and conditions of use are prepared to protect the sites"

In striking down that stipulation as unacceptable we noted first that there was no evidence that there was anything of historical or archaeological value in the area. We then said at 22 IBLA 99:

Even if there were some object of historical or archeological value to be protected in this area, the stipulation complained of would almost certainly be unacceptable, as the means to accomplish that protection are unnecessarily broad. First, the amount of land involved is nearly 100 square miles – an area 50 percent larger than the entire District of Columbia. In the absence of an extremely important archeological discovery, it is unlikely that nearly 100 square miles of public land should be effectively withdrawn from the operation of the mineral laws. Second, the stipulation might well deprive the lessee of any rights of enjoyment. The lessee may enter the area only after an archeological inventory has been conducted by the Forest Service. There is nothing in the record to indicate that the Forest Service has any plan to conduct such an inventory. Since the lessee might be deprived of any right of enjoyment of the lease if the Forest Service chooses not to conduct an inventory or fails to conduct it within a reasonably short period after the lease term begins to run, the stipulation is unreasonable. [Footnote and citations omitted, emphasis added.]

I see no material distinction between the issue in the \underline{Maddox} case and that presented by these appeals, and I would adhere to our holding in Maddox.

In sum, I find: (1) That each oil and gas lease sought by appellants would be so drastically distorted and so totally restricted by the proposed stipulations that the interest which appellants would receive could not be recognized at law as an oil and gas lease at all, but merely a contingent future priority, the creation of which is not

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authorized under the Mineral Leasing Act; (2) the putative "lessee" would have no right of enjoyment of his "lease," and no assurance of any future enjoyment — but is expected to invest in the highly speculative possibility that before the term expires he may be granted a conditional right to engage in some unspecified oil and gas activities on the land; (3) that the approval of this arrangement by the majority is violative of the large body of precedent established by this Board, which precedent is not distinguishable in any material way from this case.

I would hold that if these lands are to be leased for oil and gas, the leases must grant the lessees an assured right of reasonable enjoyment in furtherance of the purposes of the Mineral Leasing Act. If other overriding considerations of public interest preclude this for the indefinite future, then the lands should be taken off the leasing "market," as no effective oil and gas lease can be issued.

Edward W. Stuebing Administrative Judge